Nos. 98-963 and 98-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAN,
Respondents.

JOAN BRAY,
Petitioner,

v.

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee,
ZEV DAVID FREDMAN, and RICHARD ADAMS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREDMAN

PATRIC LESTER
PATRIC LESTER & ASSOCIATES
1221 Locust
St. Louis, MO 63103
(314) 231-5900

D. BRUCE LA PIERRE *
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6477
Counsel for Respondents Shrink Missouri Government PAC and Zev David Fredman

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the court of appeals hold correctly that Missouri "failed to come forward with evidence" that campaign contributions in excess of $275, $525, or $1,075 cause either corruption or the appearance of corruption?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-963

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,
v.
SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAN,
Respondents.

No. 98-978

JOAN BRAY,
Petitioner,
v.
SHRINK MISSOURI GOVERNMENT PAC,
a political action committee,
ZEV DAVID FREDMAN, and RICHARD ADAMS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREDMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 161 F.3d 519 (8th Cir. 1998). The court of appeals' order entering an injunction pending appeal (Pet. App. 20a-23a) is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court (Pet. App. 24a-41a) is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998).

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. A petition for writ of certiorari was filed on December 11, 1998 by Jeremiah W. Nixon, Attorney General of Missouri, *et al.*, and it was placed on the docket on December 14, 1998. A second petition for writ of certiorari was filed on December 15, 1998, by an intervenor on appeal, Joan Bray, and it was placed on the docket on December 16, 1998.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The court of appeals held that Missouri's $275, $525, and $1,075 limits on campaign contributions violate the First Amendment. It rejected Missouri's contention "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* (citations omitted). Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. Indeed, "the State [was]

[1] The Attorney General's petition is designated Mo. Pet., and the intervenor's petition is designated Bray Pet. The two petitions share an appendix, which is attached to the Attorney General's petition.

unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest." *Id.* at 7a.

1. Before 1994, Missouri did not limit either political contributions to candidates for state and local office or candidates' political expenditures. In 1994, Missouri imposed limits on candidates' campaign expenditures and on political contributions in two sets of amendments to Missouri's Campaign Finance Disclosure Law. Mo. Rev. Stat. §§ 130.011 *et seq.* (1994 & Supp. 1997). In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to become effective immediately, superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994).

In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits imposed by Senate Bill 650 and by Proposition A violated the First Amendment. *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The court of appeals also held that Proposition A's $100, $200, and $300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The *Carver* court held that Missouri had "no evidence as to why the Proposition A limits of $100, $200, and $300 were selected." 72 F.3d at 642-43. The state had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 643.

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective. Mo. Rev. Stat. § 130.032 (Supp. 1997). Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from $250 to $500 to $1,000. *Id.* § 130.032.1. It also provided that these contribution limits "shall be increased" to take inflation into account, *id.* § 130.032.2, and, in January 1998, the Missouri Ethics Commission increased the contribution limits.

Missouri statutes now prohibit contributions of more than $275 to candidates for state representative or for offices in districts with a population of under 100,000, *id.* § 130.032.1(3), (4); contributions of more than $525 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000, *id.* § 130.032.1(2), (5); and contributions of more than $1,075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general, as well as to candidates in districts with a population of at least 250,000. *Id.* § 130.032.1(1), (6). Contributors and candidates who violate these limits are subject to criminal penalties and to substantial civil sanctions. *Id.* §§ 130.032.7, 130.081 (1994 & Supp. 1997).

2. On May 12, 1998, the district court, on cross-motions for summary judgment, upheld Missouri's campaign contribution limits. Pet. App. 24a-41a. It found that "[t]he issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?" and that "regulation of first amendment rights" is subject to " 'strict scrutiny.' " *Id.* at 30a. The court did not decide whether Missouri "must demonstrate that campaign contributions in excess of the statutory limits cause some 'real harm,' i.e., that such contributions cause either corruption or the appearance of corruption." *Id.* Instead, the court held that "[i]f a showing of 'real harm' is required (the state claims it is not), . . . defendants here have made that showing." *Id.*

The district court relied on "evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage." *Id.* at 31a. This senator, Wayne Goode, stated that the committee " 'heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence' " and "testified to his belief that contributions in excess of the limits set by Missouri 'have the appearance of buying votes as well as the real potential to buy votes.' " *Id.* (footnote omitted).

The district court also held that the Missouri contribution limits are "narrowly tailored", *id.* at 35a-37a, and that "the effect of inflation since *Buckley* [*Buckley v. Valeo*, 424 U.S. 1 (1976)] was decided has not created a 'difference in kind' between a $1,000 contribution in 1976, and a $1,075 contribution in 1998." *Id.* at 37a (footnote omitted).

3. On July 23, 1998,[2] the court of appeals entered an order enjoining enforcement of the campaign contribution limits pending the appeal. Pet. App. 20a-23a. The court of appeals based this order on *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S.Ct. 510 (1998), a then very recent June 4, 1998 decision. In *Russell*, the court of appeals had held that that Arkansas' $100 and $300 limits on campaign contributions violated the First Amendment because the state "did not prove that the perception of corruption . . . was objectively reasonable." 146 F.3d at 569.

In granting the injunction pending appeal, the court of appeals found that "[a]ll campaign contribution limits restrict political speech, and . . . implicate the First Amendment." Pet. App. 22a. It then held that "it seems likely

[2] The opinion of the court of appeals twice states that the injunction was entered on July 27, 1998. Pet. App. 3a, 4a. In fact, the court of appeals entered its order on July 23 and then amended the order by making a grammatical correction on July 27, 1998.

that the state has failed in its burden of proof to show 'that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception.'" *Id.* (*quoting Russell v. Burris*, 146 F.3d at 568). The court also held that "it is likely the state has failed to show 'that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.'" *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569). The court of appeals then noted that the Missouri campaign contribution limits "are, after adjustment for inflation, dramatically lower than the $1,000 limit upheld in *Buckley* . . . and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption." *Id.*

4. Missouri applied to this Court, on July 30, 1998, for an order staying the injunction pending appeal. Justice Thomas denied the application on July 31, 1998.

5. The court of appeals reversed the judgment of the district court and held that the Missouri campaign contribution limits violate the First Amendment. Pet. App. 9a, 9a-10a (Ross, J., concurring).

a. Chief Judge Bowman, joined by Judge Ross, held that the state had not carried its burden of justifying the $275, $525, and $1,075 campaign contribution limits. *Id.* at 5a-7a; 9a-10a (Ross, J., concurring).

The court of appeals first rejected Missouri's attempt to "posit[], citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made" and "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions

in amounts greater than the limits in place." *Id.* (citations omitted). In imposing this burden on Missouri "to prove its compelling interest," the court of appeals expressly invoked this Court's decisions in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Id.* at 6a n.3.

Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. The court of appeals refused to "extrapolate" from examples of corruption noted by the *Buckley* Court "that in Missouri at this time there is corruption or a perception of corruption from 'large' contributions, without some evidence that such problems really exist." *Id.* (citations omitted). The court refused to "infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago." *Id.*

The state's evidence—Senator Goode's affidavit—did not fill the evidentiary void. The court of appeals found that this senator "pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof." *Id.* at 7a (citation omitted). Although this senator stated "that he and his colleagues believed that there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes,'" he "did not state that corruption then existed in the system." *Id.* Moreover, there was no way for the court of appeals to determine "whether this single legislator's perception of corruption is the 'public perception', whether it is objectively 'reasonable,' and whether it 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for

public office in Missouri." *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569).

In short, Missouri "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions." *Id.* Indeed, "the State [was] unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest." *Id.*

b. Chief Judge Bowman, writing separately,[3] also determined that the $275, $525, and $1,075 contribution limits are not "narrowly tailored" because they "are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.* at 7a, 8a. The Chief Judge found that "[a]fter inflation, limits of $1,075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago." *Id.* at 8a (footnote omitted). Noting the contention that "$1,075 in 1976 dollars is the equivalent of just $378 in purchasing power today,"[4] *id.* at 8a n.4, Chief Judge Bowman found that "[i]n today's dollars, the SB650 limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy.'" *Id.* at 8a (*quoting Buckley*, 424 U.S. at 21).

---

[3] Judge Ross agreed with Chief Judge Bowman "that the State failed to satisfy its evidentiary burden." Pet. App. at 9a-10a (Ross, J., concurring). On the basis of "the reasons stated by Judge Gibson [in dissent]," he did "not join in part III B of Judge Bowman's opinion finding that the contribution limits are different in kind from those approved in *Buckley v. Valeo*, 424 U.S. 1 (1976)." *Id.* at 10a.

[4] Chief Judge Bowman rejected Missouri's contention that the Consumer Price Index (CPI) should not be used "to calculate the effects of inflation on dollars spent for campaign contributions" and noted that the state itself uses the CPI to account for the effects of inflation after the date (1994) when the contribution limits were enacted. Pet. App. 8a n.4 (*citing* Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

Thus, "absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech," the $275, $525, and $1,075 contribution limits were "'too low to allow meaningful participation in protected political speech and association, and thus [were] not narrowly tailored to serve' the alleged interest." *Id.* (citation omitted).

The Chief Judge specifically disclaimed any attempt to "'fine tun[e]' the work of the Missouri legislature" or to exercise "authority that is not ours." *Id.* (*citing Buckley*, 424 U.S. at 30). He concluded that "the difference between these limits of $1,075, $525, and $275, and larger dollar limits that might be constitutionally sound . . . are not 'distinctions in degree' but 'differences in kind.'" *Id.* at 8a-9a (citations omitted). He "remind[ed] the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State's compelling interest in addressing proven 'real or perceived undue influence or corruption attributable to large political contributions.'" *Id.* at 9a (*quoting Russell v. Burris*, 146 F.3d at 568). Any "problem of judicial line-drawing can be expected largely to disappear" if "those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof." *Id.*

c. Judge Gibson, in dissent, would have upheld Missouri's $275, $525, and $1,075 contribution limits because he "[could] not distinguish *Buckley*." *Id.* at 10a.

Judge Gibson found that there was no "difference in kind" between Missouri's $1,075 limit and the "$1,000 [limit] upheld in *Buckley*," and he would have upheld the lower $275 and $525 contribution limits because *Buckley* had noted Congress' power to structure contribution limits with respect to graduated expenditure limits. *Id.* at 11a, 12a. He rejected Chief Judge Bowman's "argument . . . that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*";

in his view, "[i]nflation has not undermined *Buckley*'s precedential weight or modified its holding." *Id.* at 13a.

Judge Gibson also concluded that "the State has adequately justfied the contribution limits at issue." *Id.* at 14a; *see id.* at 14a-18a. Missouri, "by the Goode affidavit, [had] demonstrated . . . the dangers posed by unlimited campaign contributions." *Id.* at 17a. Judge Gibson could not "reconcile the short shrift given the Goode affidavit . . . with the Supreme Court's approach in *Buckley,* which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded." *Id.* (footnote and citations omitted).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. This case turns on a straightforward application of the common-sense proposition, frequently stated by this Court, that conjectural harms do not justify restrictions on speech. As the court of appeals recognized (Pet. App. 6a n.3), this Court has held that

> "[w]hen the Government defends a regulation of speech . . ., it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way."

United States v. National Treasury Employees Union, 513 U.S. at 475 (*quoting Turner Broadcasting System, Inc.*, 512 U.S. at 664 (plurality opinion of Kennedy, J.).

Moreover, as this Court recently held, limits on independent expenditures by political parties violate the First Amendment absent evidence that these expenditures cause some real harm. *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996). In *Colorado Republican,* six members of this Court invoked and applied the same standard as the Eighth Circuit: Justice Kennedy's statement in *Turner Broadcasting System,* 512 U.S. at 664, of the government's duty to demonstrate that regulations of speech address a real harm. 518 U.S. at 618 (Breyer, J., O'Connor, & Souter, JJ.) (citing *Turner Broadcasting System, Inc.,* 512 U.S. at 664 (Kennedy, J.) and noting that "[t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"), *id.* at 647 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (citing *Turner Broadcasting System, Inc.,* 512 U.S. at 664 (Kennedy, J.) and noting that "[t]he Government . . . has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures").

Just as this Court imposed a duty on the national government to demonstrate that political party expenditures cause some harm, the court of appeals required Missouri to demonstrate "that there were genuine problems that resulted from contributions in amounts greater than the limits in place." Pet. App. 5a. Missouri, however, did not "adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." *Id.* at 7a. Although Judge Gibson argued in dissent that a state senator's affidavit was sufficient to justify the contribution limits, *see id.* at 14a-17a, disagreement about the weight to be given Missouri's limited evidence does not warrant this Court's attention.

Given the actual ground of the court of appeals' judgment—insufficient evidence of harm to justify the $275, $525, and $1,075 contribution limits—petitioners' suggestions of inter-circuit conflict and conflict with this Court's decision in *Buckley* are overstated, and petitioners' assertion that the court of appeals imposed an "impossible burden" on Missouri is mistaken.

1. Any inter-circuit conflict over the validity of state laws prohibiting contributions in excess of $1,000, is, at most, only skin deep. *See* Mo. Pet. 9-10; Bray Pet. 13. The Sixth Circuit has upheld a Kentucky $1,000 contribution limit, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir.), *cert. denied*, 118 S.Ct. 162 (1997), and the Eighth Circuit's judgment may appear at first blush (as Judge Gibson noted in dissent) to "create[] a conflict between the circuits." Pet. App. 18a.

With regard to the actual ground for the Eighth Circuit's judgment, however, there is no conflict with the Sixth Circuit.[5] The Sixth Circuit simply did not have any

[5] The state's claim that the "panel majority" (Mo. Pet. 8) acknowledged a conflict with the Sixth Circuit is mistaken. Chief Judge Bowman, writing separately (see note 3 *supra*), concluded that Missouri's $275, $525, and $1,075 contribution limits were "different in kind" than the $1,000 limit at issue in *Buckley*, and he conceded that his conclusion was not consistent with Sixth Circuit decision in *Kentucky Right To Life, Inc. v. Terry*. Pet. App. 9a (*quoting* the *Terry* court as "holding that $1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the $1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*"). Chief Judge Bowman's separate opinion (Part III B (Pet. App. 7a-9a)), however, is not the opinion of the "panel majority." Judge Ross joined only Part III A (*id.* at 5a-7a) of Chief Judge Bowman's opinion, and they formed a "panel majority" on only one point and held, in Judge Ross' words, "that the State failed to satisfy its evidentiary burden." *Id.* at 10a. Similarly, Chief Judge Bowman's separate opinion does not provide any occasion to address Bray's contention that the lower courts are divided on "how to determine when contribution limits are 'different in kind' from the $1,000 limits upheld in *Buckley*." Bray Pet. 21; *see id.* at 21-24.

Nonetheless, Missouri's $275, $525, and $1,075 contribution limits are in fact "different in kind," not only when compared to the federal $1,000 limit on individual contributions, but also when they are compared to the $5,000 limit on contributions by political committees approved in *Buckley*. 424 U.S. at 35-37. The Missouri contribution limits apply both to individuals and political action committees, like respondent Shrink Missouri Government PAC. Thus,

occasion to consider whether a state, in the words of the Eighth Circuit, must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* at 5a (citations omitted). In the Sixth Circuit case, the Kentucky legislature had increased the contribution limit to $1,000 from $500 after plaintiffs filed their opening appellate brief, and counsel "essentially conceded at oral argument that the $1,000 limitation on contributions is constitutional under *Buckley*." *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d at 641-42 & n.10, 642-43 & n.19, 648 n.24. Thus, the Sixth Circuit's cursory approval of Kentucky's $1,000 limit is hardly surprising, and petitioners' assertion here—"it is clear that the limits embodied in Missouri's legislation would be upheld today by the Sixth Circuit"—is strained. Mo. Pet. 5.

2. Petitioners' other suggestion of inter-circuit conflict elevates form over substance. Missouri and Bray assert that the Eighth Circuit has created a conflict with the Ninth and Sixth Circuits in defining the level of scrutiny applicable to contribution limits. *See* Mo. Pet. 10-13; Bray Pet. 15-17. The judgments of the courts of appeals of these three circuits, however, do not raise the broad question that petitioners would have this Court pursue—whether campaign contribution limits should be subject to a lower level of scrutiny (intermediate) than campaign expenditure limits (strict scrutiny). Mo. Pet. 11; Bray Pet. 17.

a. The Eighth Circuit applied strict scrutiny to Missouri's $275, $525, and $1,075 contribution limits and held that Missouri "must demonstrate . . . that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." Pet. App. 5a. The Ninth Circuit recently applied "rigorous, rather

contrary to the state's contention (Mo. Pet. 5 n.2), Missouri's $275, $525, and $1,075 limits on contributions should also be compared to the federal $5,000 limit as adjusted for inflation.

than strict, scrutiny" to Oregon's limit on out-of-state contributions and held that this Oregon measure "can survive rigorous scrutiny only if it is closely drawn to advance a sufficiently important interest." *Vannatta v. Kiesling*, 151 F.3d 1215, 1216, 1221 (9th Cir.), *petition for cert. filed*, 67 USLW 3348 (Nov. 9, 1998) (No. 98-775). Even assuming that in some circumstances there might be a difference between "strict" and "rigorous" scrutiny, these standards, as actually applied by the Eighth and Ninth Circuits, are the same.

Just as the Eighth Circuit "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a), the Ninth Circuit unanimously held that Oregon's prohibition of out-of-district contributions did not "pass muster under the First Amendment" because the state was "unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." *Vannatta v. Kiesling*, 151 F.3d at 1221 (citations omitted); *see id.* at 1216, 1222 (this portion of concurring opinion adopted as unanimous opinion of the panel). Far from creating a conflict with the Eighth Circuit, the Ninth Circuit relied on a decision of the Eighth Circuit to support its requirement that Oregon must have some evidence that the prohibited political contributions cause corruption. *Id.* at 1221 (*citing Carver v. Nixon*, 72 F.3d at 644, for holding that "limits on the size of contributions were not closely drawn to reducing corruption as state made no showing that small contribution limits were necessary to curb corruption").

In short, there is no conflict between the Eighth and Ninth Circuits. The courts of appeals in both circuits, albeit under differently labeled standards of scrutiny, required Missouri and Oregon to demonstrate that the prohibited campaign contributions cause corruption or the appearance of corruption. The judgments of both the Eighth Circuit and the Ninth Circuit that state campaign

contribution limits violate the First Amendment rest on exactly the same ground: the states did not have any evidence that prohibited political contributions cause any harm.

b. Similarly, there is no conflict between the Eighth Circuit and the Sixth Circuit about the proper level of scrutiny of state limits on campaign contributions to candidates. Bray asserts, for example, that the Sixth Circuit "applied an unarticulated intermediate level of scrutiny to Kentucky's $1,000 individual contribution limits." Bray Pet. 16. The Sixth Circuit, however, did not apply any level of scrutiny—strict or intermediate—to Kentucky's $1,000 limit on individual contributions to candidates.[6] *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648. Instead, the Sixth Circuit, as discussed above, upheld Kentucky's $1,000 contribution limit, which the state legislature had increased from $500 while the appeal was pending, on the basis of counsel's concession. 108 F.3d at 648 & n.24.

3. Petitioners' suggestions that the Eighth Circuit's judgment conflicts with *Buckley* are not well-taken. *See* Mo. Pet. 13-15; Bray Pet. 10-13.

a. Bray asserts that the Eighth Circuit's decision is a "flat rejection" of this Court's holding in *Buckley* "that combating the perception of corruption is a sufficient governmental interest for imposing contribution limits." Bray

---

[6] Missouri asserts that the Sixth Circuit adopted "the proposition that a contribution limit 'does not receive the full First Amendment protection.'" Mo. Pet. 12 (*quoting Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 649). The Sixth Circuit, however, made this observation in the course of analyzing Kentucky's $1,500 limit on aggregate contributions to permanent committees, which it carefully distinguished from the state's $1,000 limit on direct contributions to candidates. *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648-49. Thus, there is no support for Missouri's conclusion that the Sixth Circuit and the Eighth Circuit apply different levels of scrutiny to limits on campaign contributions to candidates. *See* Mo. Pet. 12-13.

Pet. 10. Petitioner is mistaken. The court of appeals did not ignore this Court's determination in *Buckley* that avoiding the appearance of corruption, as well as avoiding corruption itself, are compelling governmental interests. In fact, the court of appeals expressly and repeatedly recognized that both of these interests may be compelling. *E.g.*, Pet. App. 6a ("State . . . must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions"). Missouri, however, "failed to come forward with evidence" that contributions in excess of $275, $525, or $1,075 caused either corruption or the appearance of corruption. *Id.* at 7a.

b. Petitioners also suggest that the court of appeals' requirement that Missouri must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a) conflicts with this Court's decision in *Buckley*. Mo. Pet. 13-14; Bray Pet. 17-21. Even assuming, as Missouri asserts, that in *Buckley* the legislative record was "based on razor-thin evidence" and that this Court "was willing to accept largely on faith Congress's assessment of the existence of a compelling problem," the conflict, if any, is more apparent than real. Mo. Pet. 13.

As the court of appeals explained, but both petitions fail to note, "the State's burden to prove its compelling interest" is firmly grounded on this Court's subsequent decisions. Pet. App. 6a n.3 (*quoting United States v. National Treasury Employees Union*, 513 U.S. at 475, and *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)). Thus, any threat to the $1,000 federal contribution limit upheld in *Buckley* comes not from the Eighth Circuit but from this Court's decisions requiring the national government to demonstrate that restrictions on speech address some real harm. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. at 618, 647; *United States v. National Treasury Employees Union*, 513 U.S. at 475 (*quoting Turner*

Broadcasting System, Inc., 512 U.S. at 664 (plurality opinion of Kennedy, J.)).

4. Finally, petitioners' assertion that the Eighth Circuit imposed an "impossible burden" on the state is mistaken. Mo. Pet. 13; *see id.* at 13-15; Bray Pet. 19 ("impossibly stringent standard of proof"). Missouri, for example, invokes an aphorism—strict in theory, fatal in fact—and claims that "no state legislature could enact a contribution limit that can withstand judicial scrutiny in the Eighth Circuit." Mo. Pet. 12, 15. The court of appeals has not, however, imposed an "impossible burden" on Missouri. Strict scrutiny was fatal here because Missouri, on cross motions for summary judgment, was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. Pet. App. 7a.

Given this very limited holding, Bray's concern that the Eighth Circuit requires "elaborate, empirical proof" is misplaced.[7] Bray Pet. 21; *see id.* at 20-21. Similarly, Missouri's concern that the Eighth Circuit's judgment threatens the campaign contribution limits of "[d]ozens of

---

[7] Moreover, Missouri's claim that it has "tried to find evidence that would be sufficient to meet the court's standard" is, at the very least, premature. Mo. Pet. 14 n.6. The Missouri legislature enacted the contribution limits at issue in this case in 1994. The court of appeals then held in 1995 that another set of Missouri contribution limits adopted in a 1994 initiative violated the First Amendment because Missouri had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Carver v. Nixon*, 72 F.3d at 643. Missouri, however, does not point to any effort that it subsequently made to respond to the Eighth Circuit's decision in *Carver* and "to find evidence that would be sufficient to meet the court's standard." In fact, when the legislature amended the campaign finance statutes in 1997, it set the contribution limits in exactly the same amounts originally enacted by the legislature in 1994. *Compare* Mo. Rev. Stat. § 130.032.1 (1994) *with* Mo. Rev. Stat. § 130.032.1 (Supp. 1997).

states and scores of local jurisdictions" is exaggerated. Mo. Pet. 16. These contribution limits are "subject to serious constitutional challenge under the Eighth Circuit's rationale" (Mo. Pet. 16) only if other states and localities, like Missouri, are "without some evidence" that there is a "real problem with corruption or a perception thereof as a direct result of large campaign contributions." Pet. App. 6a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

PATRIC LESTER
PATRIC LESTER & ASSOCIATES
1221 Locust
St. Louis, MO 63103
(314) 231-5900

D. BRUCE LA PIERRE *
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6477
Counsel for Respondents Shrink Missouri Government PAC and Zev David Fredman

* Counsel of Record

January 6, 1999